

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC-03M-42
02727

In the Matter of)	EB Docket No 03-96
)	
NOS Communications, Inc ,)	File No EB-02-TC-119
Affinity Network Incorporated and)	
NOSVA Limited Partnership)	NAL/Acct No 200332170003
)	
Order to Show Cause and)	FRN 0004942538
Notice of Opportunity for Hearing)	

CONSENT ORDER

Issued October 27, 2003

Released October 29, 2003

Under consideration is a Joint Request for Adoption of Consent Decree and Termination of Proceeding, filed on October 24, 2003, by the Enforcement Bureau ("Bureau"), NOS Communications, Inc , Affinity Network Incorporated, and NOSVA Limited Partnership (collectively, the "Companies"), and the principals of the Companies. For the reasons which follow, the Joint Request will be granted.

This proceeding was designated for hearing by *Order to Show Cause and Notice of Opportunity for Hearing*, 18 FCC Rcd 6952 (released April 7, 2003). Issues were specified to determine whether the Companies engaged in a misleading and continuous telemarketing campaign in apparent violation of Section 201(b) of the Communications Act of 1934, as amended ("Act") (Issue a), to determine whether the Companies' authorization pursuant to Section 214 of the Act to operate as common carriers should be revoked (Issue b), and to determine whether the Companies and/or their principals should be ordered to cease and desist from the provision of any interstate common carrier services without the prior consent of the Commission (Issue c). 18 FCC Rcd at 6965 (¶ 27). In addition, had it been shown that the Companies willfully or repeatedly violated certain provisions of the Act or the Commission's Rules, then it was to be further determined whether a forfeiture, in the maximum amount of \$1.2 million, should be imposed. 18 FCC Rcd at 6966 (¶ 30).

The Companies and the Bureau have entered into a Consent Decree which would resolve all of the issues specified in the *Order to Show Cause and Notice of Opportunity for Hearing*. The Consent Decree would also terminate this proceeding. A copy of the Consent Decree is attached hereto and is incorporated by reference.

Based upon a review and evaluation of the Consent Decree, it is concluded that it satisfies the requirements of Sections 1.93 and 1.94 of the Commission's Rules, and that the public interest would be served by its approval. Specifically, the Consent Decree will secure the future compliance with the law by the Companies and their principals, in exchange for the prompt disposition of this proceeding. See Section 1.93(b) of the Rules.

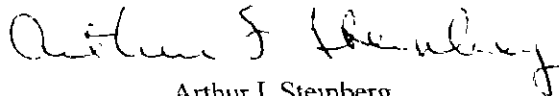
Accordingly, IT IS ORDERED that the Joint Request for Adoption of Consent Decree and Termination of Proceeding, filed by the Bureau, the Companies, and their principals on October 24, 2003, IS GRANTED.

IT IS FURTHER ORDERED, pursuant to Section 1.94(d) of the Commission's Rules, that the Consent Decree, which is incorporated herein by reference, IS ADOPTED

IT IS FURTHER ORDERED that all of the issues specified in the *Order to Show Cause and Notice of Opportunity for Hearing* ARE RESOLVED

IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Arthur I. Steinberg". The signature is fluid and cursive, with a large, stylized "A" and "S".

Arthur I. Steinberg
Administrative Law Judge

**Before the
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Affinity Network Incorporated and)	
NOSVA Limited Partnership)	NAL/Acct. No. 200332170003
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Order to Show Cause and)	FRN: 0004942538
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CONSENT DECREE

1. The Enforcement Bureau (the "Bureau") of the Federal Communications Commission ("FCC" or "Commission") and NOS Communications, Inc. ("NOS"), Affinity Network Incorporated ("ANI"), and NOSVA Limited Partnership ("NOSVA") (collectively, the "Companies") hereby enter into this Consent Decree for the purpose of terminating the above captioned proceeding (the "Proceeding") initiated by an Order to Show Cause and Notice of Opportunity for Hearing ("Order to Show Cause") issued by the Commission on April 7, 2003.¹ The matter was set for hearing to determine whether the Companies had engaged in a misleading and continuous telemarketing campaign in apparent violation of section 201(b) of the Communications Act of 1934, as amended ("Act").² The principals of the Companies were ordered to show cause why the operating authority of the Companies under section 214 of the Act³ should not be revoked, why an order directing them to cease and desist from the provision of any interstate common carrier services without the prior consent of the Commission should not be issued, and why a forfeiture should not be imposed.

2. For purposes of this Consent Decree, the following definitions shall apply.

- (a) "FCC" or the "Commission" means the Federal Communications Commission and all of its bureaus and offices.
- (b) "Bureau" means the Enforcement Bureau of the Federal Communications Commission.
- (c) "NOS" means NOS Communications, Inc., all d/b/a and plan entities of that company, including International Plus, 011 Communications, INETBA (or Internet Business Association), I-Vantage Network,

¹ See *Order to Show Cause and Notice of Opportunity for Hearing*, 18 FCC Rcd 6952 (2003)

² 47 U.S.C. § 201(b).

³ 47 U.S.C § 214.

Cierracom Systems, and any entity owned, directed or controlled by the company, including all subsidiaries, commonly-owned inter-exchange affiliates, concurring carriers, successors, and assigns.

- (d) “ANI” means Affinity Network, Inc., all d/b/a and plan entities of that company, including HorizonOne Communications and Quantum Link Communications, and any entity owned, directed or controlled by the company, including all subsidiaries, commonly-owned inter-exchange affiliates, concurring carriers, successors, and assigns.
- (e) “NOSVA” means NOSVA Limited Partnership all d/b/a and plan entities of that company, including NOSVA Network, Incorporated and Cierracom Systems, and any entity owned, directed or controlled by the company, including all subsidiaries, commonly-owned inter-exchange affiliates, concurring carriers, successors, and assigns.
- (f) The “Companies” means NOS, ANI, and NOSVA.
- (g) “Affiliates” means any entity owned, directed or controlled by either Samuel P. Delug, a twenty-five percent owner of the Companies, Robert A. Lichtenstein, a fifty percent owner of the Companies, Michael W. Arnau, the Chief Executive Officer of the Companies, and Joseph Koppy, the President of the Companies.
- (h) The “Parties” means the Companies and the Bureau.
- (i) “Order” means the order of the presiding officer adopting the terms of this Consent Decree without change, addition, or modification.
- (j) “Final Order” means an order that is no longer subject to administrative or judicial reconsideration, review, appeal, or stay.
- (k) “Effective Date” means the date on which the Order becomes a Final Order.
- (l) “Order to Show Cause” means the Order to Show Cause and Notice of Opportunity for Hearing, FCC 03-75, released on April 7, 2003, and reported in *Order to Show Cause and Notice of Opportunity for Hearing*, 18 FCC Rcd 6952 (2003).
- (m) The “Proceeding” means the evidentiary hearing initiated by the Order to Show Cause
- (n) “Winback” means an attempt by the Companies or an Affiliate to regain or retain the business of a customer that: (i) has recently made a preferred

carrier change; (ii) is in the process of making a preferred carrier change; or (iii) the Companies believe will soon make a preferred carrier change.

- (o) "Winback Program" means any plan or procedure, including the language contained in any script, adopted by the Companies or an Affiliate for Winback purposes.
- (p) "Winback Call" means a telephone solicitation for the purpose of Winback.
- (q) "Short Term Winback Call" means any Winback Call which represents, suggests or implies in any way that the customer's return to the service of the Companies or of an Affiliate is for a limited period only.
- (r) A "Partial Line Account Policy" means a policy or practice by which the Companies or an Affiliate may disconnect customer accounts that have less active lines pre-subscribed than initially provisioned because one or more of the lines initially pre-subscribed have become pre-subscribed to another carrier.
- (s) "Customer" means an authorized consumer (person, a natural person, individual, governmental agency or entity, partnership, corporation, limited liability company or corporation, trust, estate, incorporated or unincorporated association, and any other legal or commercial entity however organized) offered, receiving, or previously receiving inter-exchange services from the Companies.
- (t) "LOA" means letter of agency or letter of authorization.
- (u) "Winback Representative" means all current and future employees and agents of the Companies or an Affiliate involved with Winback, including telemarketing representatives, managers, supervisors, and agents.
- (v) "Misleading" means a misrepresentation, omission, or other practice that is intended or could reasonably be expected to deceive, confuse or misinform a reasonable consumer acting reasonably under the circumstances.
- (w) "Call as Customer" means a policy or practice by which a representative, employee, agent or other individual otherwise working on behalf of the Companies or an Affiliate requests permission from a Customer to act as the customer, identify himself or herself as the customer or otherwise hold himself or herself out as the customer for the purpose of removing any preferred interexchange or local carrier freeze on a customer account.

I. BACKGROUND

3 On April 7, 2003, the Commission released the Order to Show Cause, initiating an evidentiary hearing to determine whether the Companies had engaged in a misleading and continuous telemarketing campaign in apparent violation of section 201(b) of the Act.⁴ The Commission ordered the principals of the Companies to show cause why (1) the Companies' operating authority under section 214 of the Act⁵ should not be revoked and (2) an order directing them to cease and desist from the provision of any interstate common carrier services without the prior consent of the Commission should not be issued. The Order to Show Cause put the Companies on notice that a forfeiture up to the statutory maximum \$1.2 million could be ordered if it is determined that they willfully or repeatedly violated section 201(b) of the Act.⁶ The Bureau was made a party to the Proceeding.

4. On May 21, 2003, the presiding officer held a prehearing conference. At that conference the presiding officer imposed a pre-hearing schedule, memorialized in an order released May 23, 2003.⁷ In accordance with that schedule, the Parties were permitted to conduct discovery, to be completed on or before September 26, 2003. The Parties have been afforded the opportunity to conduct discovery and have in fact conducted discovery as each Party deemed necessary to prosecute or otherwise resolve the issues described in the Order to Show Cause.

5. On September 23, 2003, pursuant to section 1.94(a) of the Commission's Rules,⁸ the Companies informed the presiding officer of the initiation of the negotiations that lead to this Consent Decree. Pursuant to section 1.93(b) of the Commission's Rules,⁹ the Bureau negotiated this Consent Decree to secure future compliance with section 201(b) of the Act in exchange for prompt disposition of the issues addressed in the Order to Show Cause.

II. AGREEMENT

6. The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties of the Proceeding and the Order to Show Cause. In consideration for the termination of this Proceeding in accordance with the terms of this Consent Decree, the Parties agree to the terms, conditions, and procedures contained herein.

7. The Parties agree that this Consent Decree is for settlement purposes only and that signing does not constitute an admission by the Companies, or their principals, of any violation of law, rules or policy associated with or arising from its actions or omissions as described in the Order to Show Cause.

⁴ 47 U.S.C. § 201(b)

⁵ 47 U.S.C. § 214.

⁶ 47 U.S.C. § 201(b).

⁷ Order, FCC 02M-19 (May 23, 2003)

⁸ 47 C.F.R. § 1.94(a)

⁹ 47 C.F.R. § 1.93(b).

8. The Bureau agrees that, in the absence of material new evidence relating to issues described in the Order to Show Cause that the Bureau did not obtain through discovery in this Proceeding or is not otherwise currently in the Commission's possession, the Bureau will not use the facts developed in this Proceeding, or the existence of this Consent Decree, to institute, on its own motion, any new proceedings, formal or informal, or to make any actions on its own motion against the Companies, or their principals, concerning the matters that were the subject of the Order to Show Cause. Consistent with the foregoing, nothing in this Consent Decree limits, *inter alia*, the Commission's authority to consider and adjudicate any formal complaint that may be filed pursuant to section 208 of the Communications Act, as amended, and to take any action in response to such formal complaint.

9. For purposes of settling the matters set forth herein, the Companies and their Affiliates agree to take the actions described below

(a) Beginning on the Effective Date, no Winback Representative will make a Short Term Winback Call.

(b) Beginning on the Effective Date, no Winback Call will represent, suggest or imply information that:

(i) the Customer will need to take action to avoid having service immediately disrupted;

(ii) the Customer needs to sign a LOA to prevent the termination or disruption of service over any lines still billing with the Companies;

(iii) an LOA is temporary;

(iv) the Winback Call is a courtesy call;

(v) the Winback Representative is not a sales person;

(vi) a new LOA is required to carry a Customer's service during the interim period while a Customer's lines are being switched to a new carrier;

(vii) the Winback Representative is calling from the cancel department or that the Winback Representative's job is to cancel accounts or take-down service;

(viii) the Customer's request to switch carriers voids the Companies' authorization to carry the Customer's lines during the period it takes the new carrier to initiate and complete a customer requested switch;

(ix) the Companies have a tariff on file with the FCC;

- (x) the FCC will hold the Companies liable for slamming if the Customer fails to sign an LOA to authorize the Companies to carry the Customer's service during the period it takes a new carrier to initiate and complete a Customer requested switch; or
 - (xi) is otherwise Misleading in a material respect.
- (c) Beginning on the Effective Date, the Winback Program will require a Winback Representative to make, and each Winback Call will convey, a representation that:
 - (i) the purpose of the call is to retain and/or regain the Customer's business;
 - (ii) if the Winback Representative requests that a Customer sign an LOA, the Winback Representative will convey that signing an LOA will authorize the Companies to act as the Customer's carrier; and/or
 - (iii) if the Winback Representative states that the Customer has current call traffic, the Winback Representative will state how current the information is.
- (d) Beginning within 30 days of the Effective Date, the Companies will not maintain a Partial Line Account Policy. The Companies will remove the Partial Line Account Policy from their website(s), tariffs, and customer contracts. The Companies also agree not to have a Partial Line Account Policy in the future.
- (e) Beginning within 30 days of the Effective Date, the Companies will not request authorization to "call as customer."
- (f) Beginning within 30 days of the Effective Date, the Companies will adopt and implement a written Winback Compliance Program (the "Compliance Program") focused on the requirement for full and accurate disclosures to Customers by every Winback Representative in every Winback Call. The Compliance Program will include, but is not limited to, the following components.
 - (i) Copies of Consent Decree to Prospective Successors or Assigns: Prior to any sale, dissolution, reorganization, assignment, merger, acquisition or other action that would result in a successor or assign for provision of the Companies' interstate communications services, the Companies will furnish a copy of this Consent Decree to such prospective successors or assigns and advise same of their duties and obligations under this Order.
 - (ii) Notice of Consent Decree Requirements to Officers, Directors, Managers, and Employees: The Companies will be responsible for making the substantive requirements and procedures set forth in this Consent

Decree known to their respective directors and officers, and to managers, employees, agents, and persons associated with the Companies who are responsible for implementing the obligations set forth in this Consent Decree. The Companies will, within thirty (30) days of the Effective Date, deliver to each of their current directors and officers, and to all Winback Representatives, written instructions as to their respective responsibilities in connection with the Companies' compliance and obligations under this Consent Decree. The Companies will distribute said instructions to all of their future directors and officers wherever located, and to all future Winback Representatives, within 30 days of the date on which such individuals are appointed or hired to such positions.

(iii) Winback Code of Conduct: The Companies will establish a Winback Code of Conduct (the "Code"), which will conform to this Consent Decree and be reviewed and signed by all current Winback Representatives. As part of their initial training, each new Winback Representative will also sign the Code. All Winback Representatives will reaffirm annually, in writing that they have recently reviewed, and fully understand, the Code. The Code will establish a strict quality standard, to which all Winback Representatives will be required to adhere. The Code will establish, *inter alia*, that all Winback Representatives will make representations consistent with paragraphs 9(b) through 9(c) above.

(iv) Mandatory Quality Training. All Winback Representatives will be required to attend a comprehensive supplemental training session regarding any Winback Program, the Compliance Program, and the Code. Such training sessions will be repeated annually for all Winback Representatives, at which time they again will be required to sign the Code, acknowledging their understanding of its requirements and verifying their intent to comply with them. At the conclusion of the training sessions, the Companies will require a Mastery Test to be taken, and passed, by each Winback Representative.

(v) Post-Winback Review: The Companies' post-Winback review process will be modified to check specifically for compliance with the Compliance Program and the Code.

(vi) Compliance Infraction List: The Companies' Compliance Infraction List will be modified to conform to this Consent Decree and make a material violation of the Code a major infraction that will result in immediate termination of employment.

(vii) Complaints: As of the Effective Date, the Companies will promptly and in good faith address and resolve all complaints regarding their Winback Program in a reasonable manner consistent with this Consent Decree and the Compliance Program. In all cases where the Companies conclude that Misleading statements were made to a Customer

by a Winback Representative, the Companies will take appropriate disciplinary action against the employee or agent in question, consistent with the standards set forth in the Compliance Program. In all cases where the Companies conclude that Misleading statements were made by a Winback Representative, the Companies will contact the Customer and provide appropriate remedies.

(viii) Reporting: Within 60 days from the Effective Date,¹⁰ the Companies will provide a formal report to the Bureau. The Companies will provide additional reports every twelve (12) months, continuing for twenty-six (26) months from the Effective Date. Each report will include the following: (a) a status report on the Companies' progress in implementing this Consent Decree, (b) a list of all infractions assigned to Winback Representatives under the Compliance Infraction List related to this Consent Decree during that period, (c) copies of all Customer complaints related to the Companies' compliance with this Consent Decree for the period since the previous report, including copies of the resolution of any such complaint, and (d) electronic recordings of the Winback calls made to or by the complainants.

(g) Should the Companies wish to make any changes to the Winback Program outlined in paragraph 9 of this Consent Decree during the period beginning on the Effective Date and continuing twenty-six (26) months from the Effective Date, they must submit the proposed change in writing to the Bureau no later than 30 days before the proposed adoption of the change. Within 30 days of receipt of any proposed change to the Winback Program, the Bureau shall advise the Companies whether it objects to the proposed change. Within 10 days of receiving any objection from the Bureau, the Companies shall be permitted to present for the Bureau's consideration further justification for the proposal. Should the Bureau fail to object expressly to the proposed change within the 30-day time period, the Companies shall be free to implement it. If the Bureau should object expressly to the proposed change within the 30-day time period, the Companies shall not implement it.

10. The Companies will make a voluntary contribution (not a fine or penalty) to the United States Treasury in the amount of \$1.2 million within ten (10) calendar days after the Effective Date. The Companies must make this payment by check, wire transfer or money order drawn to the order of the Federal Communications Commission, and the check, wire transfer or money order should refer to NAL Acct. No. 20033217003 and FRN No. 0004942538. If the Companies make this payment by check or money order, they must mail the check or money order to: Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. If the Companies make this payment by wire transfer, they must wire such payment in accordance with Commission procedures for wire transfers.

¹⁰ At the request of the Bureau, during this initial 60-day period following the Effective Date, the Companies also will provide informal status reports on the implementation of the Winback Program

11. In express reliance on the covenants and representations contained herein, the Bureau agrees to terminate this Proceeding and resolve the Show Cause Order.

12. The Companies agree, that within five (5) business days of the Effective Date, they will formally request the Commission to dismiss with prejudice their Petition for Reconsideration of the Order to Show Cause, filed on May 7, 2003, and all related pleadings, if still pending at that time.

13. The Companies admit that they operate as resellers of interstate telecommunications services and that the FCC has jurisdiction over them and the subject matter of this Proceeding for the purposes of this Consent Decree. The Companies represent and warrant that they are the properly named parties to this Consent Decree and are solvent and have sufficient funds available to meet fully all financial and other obligations set forth herein. The Companies further represent and warrant that they have caused this Consent Decree to be executed by their authorized representative, as a true act and deed, as of the date affixed next to said representative's signature. Said representatives and the Companies respectively affirm and warrant that said representative is acting in his/her capacity and within his/her authority as a corporate officer of the Companies, and on behalf of the Companies and that by his/her signature said representative is binding the Companies to the terms and conditions of this Consent Decree. The Companies and their principals also represent that they have been represented by counsel of their choice in connection with this Consent Decree and are fully satisfied with the representation of counsel.

14. The Companies represent and warrant that they shall not effect any change in their form of doing business or their organizational identity or participate directly or indirectly in any activity to form a separate entity or corporation which engages in acts prohibited in this Consent Decree or for any other purpose which would otherwise circumvent any part of this Consent Decree or the obligations of this Consent Decree.

15. The Companies waive their right to a hearing on the issues designated in the Show Cause Order, including all of the usual procedures for preparation and review of an initial decision. The Companies waive their right to judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Order, provided the presiding officer issues the Order without change, addition, or modification of this Consent Decree.

16. The Companies' and the Bureau's decision to enter into this Consent Decree is expressly contingent upon the signing of the Order by the presiding officer and the Order becoming a Final Order without revision, change, addition, or modification of this Consent Decree. The Parties agree that either the Bureau or the Companies may withdraw from this Consent Decree if any revision, change, addition, or modification is made to its terms.

17. The Parties agree that the Show Cause Order may be used in construing this Consent Decree.

18. The Parties agree that this Consent Decree shall become part of the record of this Proceeding only on its Effective Date.

19. If the Commission, or the United States on behalf of the Commission, brings a judicial action to enforce the terms of this Consent Decree, the Parties will not contest the validity of the Consent Decree, and the Companies and their Affiliates will waive any statutory right to a trial *de novo*. The Companies and their Affiliates do not waive any statutory right to a trial *de novo* to determine whether they violated this Consent Decree.

20. The Companies and their principals waive any rights they may otherwise have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 C.F.R. § 1.150 *et seq.*

21. In the event that this Consent Decree is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

22. Any material violation of the Consent Decree will constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order. The Commission agrees that before it takes any formal action in connection with any alleged or suspected violation of this Consent Decree, the Companies or their Affiliates will be notified of the alleged or suspected violation and be given a reasonable opportunity to respond.

23. The Parties agree that if any provision of the Consent Decree conflicts with any subsequent rule or order adopted by the Commission, where compliance with the provision would result in a violation, (except an order specifically intended to revise the terms of this Consent Decree to which the Companies and their principals do not consent) that provision will be superseded by such Commission rule or order.

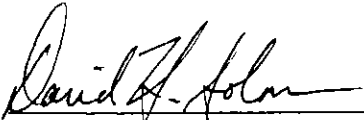
24. By this Consent Decree, the Companies do not waive or alter their right to assert and seek protection from disclosure of any privileged or otherwise confidential and protected documents and information, or to seek appropriate safeguards of confidentiality for any competitively sensitive or proprietary information. The status of materials prepared for, reviews made and discussions held in the preparation for and implementation of the Companies' compliance efforts under this Consent Decree, which would otherwise be privileged or confidential, are not altered by the execution or implementation of the terms of this Order and no waiver of such privileges is made by this Consent Decree.

25. The Parties agree that, within five (5) business days after the date of this Consent Decree, they will file with the presiding officer a joint motion and draft order requesting that the presiding officer sign the draft order, accept Consent Decree, and

close the record. The Parties will take such other actions as may be necessary to effectuate the objectives of this Consent Decree.

26. This Consent Decree may be signed in counterparts.

For the Enforcement Bureau,
Federal Communications Commission



David H. Solomon
Chief

10/20/03
Date

For NOS Communications, Inc.,
Affinity Network Incorporated, and
NOSVA Limited Partnership

Michael Arnau
Chief Executive Officer

Date

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For the Enforcement Bureau,
Federal Communications Commission

For NOS Communications, Inc.,
Affinity Network Incorporated, and
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Date

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